Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-405

NOGALES SERVICE CENTER,
an Arizona corporation,

Petitioner,

v.

ATLANTIC RICHFIELD COMPANY,
a Pennsylvania corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION TWO

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CITATIONS

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No.

NOGALES SERVICE CENTER,
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PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION TWO

NOGALES SERVICE CENTER petitions for a Writ of Certiorari to review the judgment of the Court of Appeals, State of Arizona, in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*) is not yet reported.

JURISDICTION

The judgment of the Arizona Supreme Court, denying review in this case, was entered on June 13, 1978 (App. B, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the courts of general jurisdiction of the various states are precluded by Federal decisional or statutory law from entertaining private actions seeking damages for violations of the antitrust laws of the United States.

STATUTORY PROVISIONS INVOLVED

15 U.S.C. §15, 38 Stat. 731:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT

Petitioner, Nogales Service Center, is a retail truck stop operator in Nogales, Arizona, which purchases its gasoline

and diesel fuel requirements from Respondent, Atlantic Richfield Company. In 1975, Nogales Service Center filed an action against the Company in the United States District Court for the District of Arizona, alleging that the Company had violated the Sherman Act, the Robinson-Patman Act, the Arizona Uniform State Antitrust Act, and had breached a contract by which the Company had agreed to price its product to Nogales Service Center on a competitive basis, thereby damaging Nogales Service Center by several hundreds of thousands of dollars.

Petitioner was heavily indebted to the Company for a capital improvement loan that enabled it to construct the truck stop facilities it operates. In April of 1976, the Company instituted an action of foreclosure in the Santa Cruz County Superior Court, declining to plead its claim in the Federal Court as a counterclaim to Plaintiff's action. Service Center, both by way of affirmative defense and as counterclaims, pleaded each of the contract, State and Federal Antitrust Act claims previously asserted in the action in the United States District Court.

The Company obtained a summary judgment foreclosing its realty and chattel mortgages upon the assets of Service Center and, at the same time, moved for and was granted dismissal of the Federal antitrust claims in Service Center's Counterclaim on the ground that the State trial court lacked subject matter jurisdiction of Federal antitrust claims. Service Center had argued before the trial judge that the private action section of the Sherman Act[1] and of the Clayton Act[2] were not intended by Congress to vest

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[1]Sherman Act, §7 26 Stat. 210.

[2]Clayton Act, §5, 38 Stat. 731, 15 U.S.C. §15.

exclusive subject matter jurisdiction in the Federal courts, or private actions under the Federal antitrust laws.

Both the trial court and the Arizona Court of Appeals agreed that, notwithstanding Congressional history to the contrary, dictum from *Freeman v. Bee Machine Co.*, 319 U.S. 448 (1943), precluded the exercise by a state court of jurisdiction over Federal antitrust claims. The Arizona Court of Appeals concluded that the statement in *Freeman* was "not supported by any judicial reasoning, but apparently was based upon a casual reference to 15 U.S.C., paragraph 15" and that the Congressional history of the Act was never considered by this Court. (App. A, *infra.*) It thus affirmed dismissal of Service Center's claims for lack of subject matter. The Arizona Supreme Court declined review. (App. B, *infra.*)

REASONS FOR GRANTING THE WRIT

In 1920, Mr. Justice Day wrote an opinion for the Court in *Blumenstock Brothers Advertising Agency v. Curtis Publishing Company*, 252 U.S. 436 (1920). In the course of holding that an antitrust case filed in a United States District Court alleged sufficient transactions in interstate commerce to plead a substantial Federal claim, Justice Day wrote that an action under the Sherman Act "is wholly statutory, and can only be brought in a District Court of the United States". 252 U.S. at 440. This statement was wholly superfluous dictum, unnecessary to the judgment or opinion, and made without consideration of the statute.

In 1943, Mr. Justice Douglas authored *Freeman v. Bee Machine Co., Inc.*, 319 U.S. 448 (1943). It held that a

defendant in a case removed to a United States District Court on grounds of diversity was found in that District for purposes of venue in the bringing of an antitrust claim. In the course of that opinion, Justice Douglas stated in footnote 6, 319 U.S. at 451, that a state court did not have jurisdiction over a cause of action under the antitrust laws. This statement was wholly unnecessary to the decision of the *Freeman* case.

On the basis of the dicta of *Blumenstock* and *Freeman*, courts have held, as did the court below in this case, that Federal antitrust claims could not be brought in a state court. Yet, Congress clearly intended for the courts of the states to have concurrent jurisdiction with those of the Federal Court, over such claims.

When the Senate was debating §7 of the Sherman Act, an amendment to spell out the right of a litigant to sue in a state court was defeated because the Senate believed the section already allowed suits in a state court. As Senator Edmunds stated on the floor of the Senate:

> "It leaves everybody, as everybody now has the power under any law of the United States, to sue anybody who wrongs him, whether against the law of the state or of the United States, in a state court if he chooses to do so." *Bills and Debates in Congress Relating to Trusts*, S. Doc. No. 147, 57th Congress, 2d Sess., p.316 (1903).[3]

The quoted statement was not simply a casual reference, but a considered position. Senator Edmund continued later in the debate:

> "I repeat that this section was intended by the Committee on the Judiciary to allow anybody who wished, to sue in a court of the United States without

[3]Hereinafter cited as "S. Doc. 174".

> regard to the $2,000.00 limitation, leaving to any man the original right to sue anybody that offended him in the courts of his own state and the courts of his own county." S. Doc. No. 174, p. 317.

And, further,

> "[T]he language is an authority that the man 'may sue in the circuit court of the United States' without regard to the amount in controversy. It is not intended and designed by a long settled line of decisions to exclude the jurisdiction of the courts of the states." *Ibid.*

Relating to the same §7, debate in the House indicated the same understanding. Representative Culbertson on the floor of the House said that to construe §7 to limit jurisdiction to the courts of the United States would be "a misconstruction". S. Doc. 147, p. 333. Representative Culbertson repeated the understanding that state court jurisdiction was to be left open to private litigants under §7:

> "If Congress had declared that the Circuit Court should have exclusive jurisdiction over these subjects, then as a matter of course, the state courts would be deprived of any right or power under the laws of the several states to entertain jurisdiction of any case of this character. But it is simply provided that the Circuit Court shall have jurisdiction without regard to the amount, leaving the state courts open to every person who may desire to go into them to recover actual damages." S. Doc. No. 174, p. 334.

When, in 1914 Congress adopted the Clayton Act, §5 replaced Sherman Act §7. The legislators again understood that concurrent jurisdiction was being allowed. *See* the remarks of Congressman Scott, 51 Congressional Record 9417, commenting that a private plaintiff could sue in the courts of the states.

It is, of course, an elementary proposition that "unless the Congress expressly makes Federal court jurisdiction exclusive, Federal and state courts have concurrent jurisdiction to try Federal claims". 13 Wright, Miller and Cooper *Federal Practice & Procedure*, §3527, p. 124. The statute itself says that a litigant "may" sue in the Federal courts but does not require them to do so. And, Congress is able to state clearly its intention that Federal jurisdiction be exclusive. For example, *see* 28 U.S.C. §1338, vesting in the district courts jurisdiction of patent and copyright disputes, and saying that "such jurisdiction shall be exclusive of the courts of the state". 28 U.S.C. §1338.

The question of whether private actions under the Federal antitrust laws have been mistakenly restricted to the district courts is of great moment. If the dicta of Justices Day and Douglas should no longer be followed, the district courts may no longer have to shoulder alone the burden of from thirteen to sixteen hundred private, civil antitrust actions filed each year.[4]

There is no reason to limit adjudication of private actions, to the courts of the United States.

In recent years, enforcement by the states of the antitrust laws, including state laws, has grown phenomenally. Where cases typically combine pleading of a Federal claim with claims arising under state antitrust laws, the courts of the states are deprived of an opportunity to shape the course of their own state antitrust laws, by the requirement that any case which contains a Federal claim be brought in a Federal court. Elimination of this restriction may help to

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[4] *See* the *1977 Annual Report of the Director of the Administrative Office of the U.S. Courts*, reporting that in 1975 there were 1375 civil antitrust actions filed in the district courts; 1504 in 1976 and 1611 in 1977.

restore "the proper jurisdictional balance between the Federal and the state court systems, assigning to each system those cases most appropriate in the light of the basic principles of federalism". Burger, "*Has the Time Come*", 55 F.R.D. 119, 121 (quoting the ALI study on Division of Jurisdiction Between State and Federal Courts).

Elimination of the dictum precluding state courts from hearing Federal antitrust claims will also serve the purposes of judicial economy. Just as, before *Erie Railroad Co. v. Thompkins*, 304 U.S. 64 (1938), litigants were encouraged to shop between state and Federal forums by the existence of different substantive law, antitrust litigants may seek, or avoid, the district courts because of the availability of Federal antitrust claims in the district court, or the fact that they cannot be subjected to Federal antitrust claims in the courts of the states. In fact, this case involved considerations of this kind. The dispute between the parties was begun in the District Court of Arizona. The Company brought its foreclosure action in the state court, knowing both that it could proceed to judgment before the Federal court, burdened with extensive criminal narcotics cases, could hear the case, and also that it could not be sued in return, in the state action, under the Federal Antitrust Act. Because of the dicta in *Freeman* and *Blumenstock*, there are now pending two actions where one should have sufficed.

The issue raised by this case, while substantial in its implications for the division between state and Federal courts, and the multiplicity of litigation, would disturb virtually no vested rights, nor upset any established expectations. It would simply open up a new procedure for resolving these claims. There is, therefore, little reason that

the dicta of *Freeman* and *Blumenstock* should not be reversed, so that this case and many others will be decided upon their merits, and not upon the "uncertainty, delay and expense, and above all the injustice of deciding cases upon points of practice, which are the mere etiquette of justice". Erickson *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277.

CONCLUSION

For the reasons stated, it is, therefore, respectfully submitted that the Petition for a Writ of Certiorari should be granted.

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Attorney for Petitioner

September, 1978

APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED
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CLERK COURT OF APPEALS
Division Two

NOGALES SERVICE CENTER, formerly known as NOGALES TRUCK TERMINAL, INC., an Arizona corporation,

Appellant,

v.

ATLANTIC RICHFIELD COMPANY, a Pennsylvania corporation,

Appellee.

2 CA-CIV 2772

OPINION

Appeal from the Superior Court of Santa Cruz County
Honorable Gordon Farley, Judge
Cause No. 8151
AFFIRMED

Molloy, Jones, Donahue, Trachta & Childers, P.C.
by Michael J. Meehan
Attorneys for Appellant — Tuscon

Lesher, Kimble & Rucker, P. C.
by Robert O. Lesher
Attorneys for Appellee — Tucson

RICHMOND, Chief Judge

This is an appeal from a partial summary judgment of foreclosure entered during the pendency of appellant's counterclaim, and from dismissal of three counts of the counterclaim asserting federal antitrust claims. Judgment was entered pursuant to 16 A.R.S. Rules of Civil Procedure, Rule 54(b). We find no error and affirm.

In 1969, Atlantic Richfield Company (Arco), a refiner and marketer of petroleum products, loaned $300,000 to appellant for construction, supply and operation of its truck and automobile service station facility in Nogales. Appellant executed and delivered a promissory note, secured by realty mortgage, and a security agreement covering appellant's inventory and accounts receivable. On the same date the parties entered into a product agreement requiring appellant to purchase not less than 50 percent of all of its fuel requirements from Arco for a term of 15 years. Arco subsequently perfected its security interest in the inventory and accounts receivable.

In early 1973 an additional $100,000 was loaned to appellant by Arco. Appellant executed and delivered another promissory note.

In 1976 Arco commenced this action, alleging in separate counts that the promissory notes were subject to acceleration because payments were delinquent, and seeking foreclosure of the mortgage and delivery of the personal property and accounts receivable covered by the security agreement.

In its answer, appellant alleged that its obligations to Arco were "subject to, reduced and eliminated by an offset in the amount and upon the claims pleaded" in an accompanying counterclaim. It further alleged that the loan agreement upon which Arco's claims were based was void

and unenforceable, being in violation of the Arizona Antitrust Act. The first three counts of the counterclaim, which subsequently were dismissed by the trial court on Arco's motion, alleged violations of the Robinson-Patman Act and Sherman Act. The fourth count alleged violation of Arizona antitrust statutes, and the fifth count sought damages for breach of contract.

In the contract count, appellant alleged that in late June or July of 1972, Arco had induced appellant to borrow the $100,000 evidenced by the second promissory note for construction of major additions to its truck stop facilities by agreeing to certain discounts on diesel fuel, but that after delivery of appellant's promissory note in February 1973, Arco had filed and refused to establish the discounts. As a result, it alleged, appellant was unable to compete successfully with other retailers and had sustained damages in excess of $400,000. On deposition and at an evidentiary hearing on Arco's motion for partial summary judgment, William J. Terpening, appellant's president and a principal shareholder, admitted that the notes were delinquent but testified that he had computed damages of $890,000 as a result of Arco's breach of its agreement, based on appellant's profit margin per gallon and the projected gallonage it had expected to sell at competitive prices under the discount agreement.

This court recently held that a claim for unliquidated damages, absent some special equity in the pleader's favor, will not avoid a judgment of foreclosure. Nutter v. Occidental Petroleum Land and Development Corporation, _____ Ariz. _____, 573 P.2d 532 (1977). Terpening's computation of appellant's damages based on projected gallonage does not render appellant's claim

liquidated. *See* Costanzo v. Stewart Title & Trust of Phoenix, 23 Ariz. App. 313, 533 P.2d 73 (1975). The following language from *Nutter* seems equally applicable here:

> "The situation between the parties is not such that justice cannot otherwise be done. In the absence of an allegation of [Arco's] insolvency or other special equity that would render it probable that the [appellant] would lose [its] demand and be compelled to pay the demand of [Arco], the general rule applies and the [appellant] cannot set off a personal demand for unliquidated damages against the mortgage debt." 573 P.2d at 534.

Appellant argues that in any event it has presented a defense of recoupment, precluding summary judgment whether or not its claim is liquidated. W. J. Kroeger Co. v. Travelers Indemnity Co., 112 Ariz. 285, 541 P.2d 385 (1975). Recoupment is confined to the contract on which plaintiff sues, whereas setoffs generally include all mutual debts and liabilities. Crow v. Mothers Beautiful Co., 115 Ga. App. 747, 156 S.E.2d 193, 194 (1967). Appellant has not alleged fraud in the inducement, which would preclude summary judgment on the secured promissory notes if supported by evidence raising material issues of fact. *See* Light v. Chandler Improvement Co., 33 Ariz. 101, 261 P. 969 (1928). The alleged breach of contract and antitrust violations are extrinsic to the promissory notes and as such do not invoke the principles of recoupment.

Based on the foregoing, we find no abuse of discretion to the trial court's entry of judgment of foreclosure under Rule 54(b).

In its minute entry dismissing the federal antitrust claims, the court stated:

> "The Court finds that the Motion to Dismiss is appropriate in the light of the case of Freeman v. Bee

Machinery Company, [139 U.S. 448, 63 S. Ct. 1146 (1943)] although the statement by the majority and minority opinions that 'actions under the Sherman Act are exclusively vested in the U.S. District Court' was not supported by any judicial reasoning, but apparently was based upon a casual reference to 15 USC, Paragraph 15 and the point raised by the Defendant that the Congressional history of the Act would not warrant such a statement was never considered by the Court. However, it would be an exercise in futility for this Court to fly in the face of the statement of both the majority and minority opinion in that case."

We are unable to gainsay the trial court. Although dictum in *Freeman*, the statement that state courts lack subject matter jurisdiction of actions for violation of the federal antitrust laws has since appeared in a number of cases decided by lesser federal courts. *See, e.g.*, State of Washington v. American League of Professional Baseball Clubs, 460 F.2d 654 (9th Cir. 1972). Further, the record discloses that the identical claims were the subject of an action commenced by appellant and Terpening against Arco in United States District Court, which was pending at the time Arco commenced its action for foreclosure in superior court. We find no error in dismissal of the federal antitrust claims.

Affirmed.

JAMES L. RICHMOND, Chief Judge

CONCURRING:

LAWRENCE HOWARD, Judge

JAMES D. HATHAWAY, Judge

APPENDIX B

SUPREME COURT
STATE OF ARIZONA
PHOENIX
85007

June 14, 1978

NOGALES SERVICE CENTER, formerly known as NOGALES TRUCK TERMINAL, INC., an Arizona corporation, Appellant, vs. ATLANTIC RICHFIELD COMPANY, a Pennsylvania corporation, Appellee.	Supreme Court No. 13800-PR Court of Appeals No. 2 CA-CIV 2772 Santa Cruz County No. 8151

The following action was taken by the Supreme Court of the State of Arizona on June 13, 1978 in regard to the above-entitled cause:

"ORDERED: Petition for Review = DENIED."

Record returned to the Court of Appeals, Division Two, Tucson, this 14th day of June, 1978.

RECEIVED

JUN 16 1978

MOLLOY, JONES, DONAHUE, TRACHTA & CHILDERS, P.C.

Reviewed: yes
Doc: no
Date 6/16/78
By

CLIFFORD H. WARD, Clerk

By Kathleen E. Kempley
Deputy Clerk

TO: Michael J. Meehan, Esq., Molloy, Jones, Donahue, Trachta & Childers, Arizona Bank Plaza, P.O. Box 2268, Tucson, Arizona 85702

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